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THE MALLEABLE USE OF HISTORY IN SUBSTANTIVE DUE PROCESS JURISPRUDENCE: HOW THE "DEEPLY ROOTED" TEST SHOULD NOT BE A BARRIER TO FINDING THE DEFENSE OF MARRIAGE ACT UNCONSTITUTIONAL UNDER THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

Abstract: Passed in 1996, the Defense of Marriage Act ("DOMA") clarifies "marriage" as referring exclusively to a legal union between one man and one woman as husband and wife. Paralleling the intense social debate over same-sex marriages, DOMA sparked an array of scholarly attacks on its own constitutionality. The author argues that scholarship should not overlook substantive due process jurisprudence in challenging DOMA. The U.S. Supreme Court's use of history in defining fundamental rights under substantive due process is sufficiently flexible to accommodate same-sex marriages within the fundamental right to marriage. The Court, although emphasizing tradition and history as the roots from which fundamental rights stem, has been willing to overlook, or to selectively read, such history and traditions. The author concludes that a failure to extend fundamental right status to same-sex marriage would in fact undermine some of the Court's most notable precedents in this area of law.

INTRODUCTION

On September 21, 1996, President Clinton signed into law the Defense of Marriage Act ("DOMA").[1] Congress enacted DOMA to protect society from the perceived menace that same-sex marriages pose to heterosexuality, morality, and procreation.[2]

Congress enacted DOMA in 1996 largely as an attempt to circumvent the impact of the rulings in *Baehr v. Lewin* and in *Romer v. Evans*.[3] In 1993, in *Baehr*, the Hawaii Supreme Court held that denial

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[1] 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).

[2] Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 844 (1998).

[3] *See* Romer v. Evans, 517 U.S. 620 (1996); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 204 (1997).

of marriage to same-sex couples constitutes gender discrimination, and is therefore subject to strict scrutiny under the Hawaii Constitution's Equal Protection Clause.[4] In 1996, in *Romer*, the U.S. Supreme Court struck down Colorado's Constitutional Amendment 2, which prohibited government action or policies that protected gay men and lesbians from discrimination.[5] The *Romer* Court held that gay men and lesbians[6] are not a suspect classification for the purposes of federal equal protection analysis, and thereby applied only minimum rationality scrutiny.[7] The Court reasoned, however, that under the Fourteenth Amendment to the U.S. Constitution, prejudice toward a group that amounts to an animus is an impermissible justification for denying such a group equal protection of the laws.[8]

In response to judicial acknowledgement of the civil rights of Lesbian, Gay, Bisexual, and Transgendered ("LGBT") people,. Congress passed DOMA.[9] DOMA permits individual states to refuse recognition of any same sex marriage, even one recognized by another state.[10] More importantly for due process purposes, DOMA defines the words "marriage" and "spouse" for the purposes of federal statutes and regulations as referring exclusively to a legal union between one man and one woman as husband and wife.[11]

Given the intense debate over the constitutionality of same-sex marriages, DOMA sparked an array of scholarly attacks on its own constitutionality.[12] Most of the literature thus far has focused on whether Congress had the power to enact DOMA under the Full Faith and Credit Clause.[13] Some limited commentary has analyzed DOMA's constitutionality under the Establishment Clause and the Equal Protection Clause.[14]

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[4] 852 P.2d at 67.

[5] 517 U.S. at 635–36.

[6] Note that the *Romer* Court referred to this class as "homosexuals" in its opinion.

[7] 517 U.S. at 634–35.

[8] *Id.* at 634.

[9] *See* Kelly, *supra* note 3, at 204.

[10] 28 U.S.C. § 1738C (including public acts, records, or judicial proceedings).

[11] *Id.*

[12] *See, e.g.*, Mark Strasser, Baker *and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998); Sherri L. Toussaint, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924 (1997) (citing extensive scholarly commentary, including Laurence Tribe's testimony to Congress, on the unconstitutionality of DOMA).

[13] *See, e.g.*, Strasser, *supra* note 12.

[14] *See, e.g.*, James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & LAW 335 (1997); Toussaint, *supra* note 12 (analyzing DOMA under substantive due process and equal protection).

Few scholars, however, have analyzed DOMA's constitutionality under the Due Process Clause of the Fifth Amendment.[15] Those who have, either tentatively endorsed its usefulness in challenging DOMA's constitutionality, or concluded that other avenues, such as the Equal Protection Clause, are preferable to the due process route.[16]

This Note argues that the U.S. Supreme Court's use of history in defining fundamental rights under substantive due process is sufficiently flexible to accommodate same-sex marriages within the fundamental right to marriage.[17] Such a finding would consequently subject DOMA to strict scrutiny under the Fifth Amendment's Due Process Clause.[18] Additionally, this Note argues that a contrary finding might undermine the substantive due process protection accorded to other areas of choice about one's intimate associations, particularly abortion and contraception.[19] Indeed, the Court's refusal to apply similar historical methodologies to same-sex marriages could call into question the continued viability of those methodologies.[20]

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[15] *See* Kelly, *supra* note 3, at 220–26; Toussaint, *supra* note 12, at 959–61; Germaine Winnick Willett, Note, *Equality Under the Law or Annihilation of Marriage and Morals? The Same-sex Marriage Debate*, 73 IND. L.J. 355, 362–65 (1997). Note that other scholars have commented on the application of substantive due process to same-sex marriages, but not with a specific focus on DOMA's constitutionality. *See, e.g.*, Anne B. Brown, *Note: The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917, 924–28 (1998).

[16] *See* Kelly, *supra* note 3, at 220–21, 230–31 (distinguishing *Bowers v. Hardwick* on the ground that it was not about marriages, and arguing that the right to same-sex marriages can be found to be deeply rooted in history if a broader view of history, which includes historic inconsistencies and multi-cultural traditions, is adopted by the Court); Toussaint, *supra* note 12, at 939–40, 952, 960 (analogizing same-sex marriages to interracial marriages, and arguing that, since the *Loving v. Virginia* Court rejected the argument that interracial marriages are not themselves rooted in history and traditions, the same argument should not prevail for same-sex marriages; further framing the right in question as freedom of personal choice and concluding that, because lower courts have used the "deeply rooted" test to deny fundamental right status to same-sex marriages, the Equal Protection Clause would be a preferable route to challenge DOMA); *see also* Willett, *supra* note 15, at 363 (pointing out that the Court upheld abortion, contraception, and interracial marriages as fundamental rights despite the fact that states traditionally proscribed them). Although Willett points out the Court's flexible use of history in substantive due process cases, she never explicitly argues, as this Note does, that the "deeply rooted" test need not be a barrier to according fundamental right status to same-sex marriages, even if the right is narrowly defined. *See* Willett, *supra* note 15, at 363–65.

[17] *See infra* notes 196–250 and accompanying text.

[18] *See* Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978).

[19] *See infra* notes 251–255 and accompanying text.

[20] *See infra* notes 251–261. Note that commentators have not yet argued, as this Note does, that a refusal to extend fundamental right status to same-sex marriages in a constitutional challenge to DOMA would impair the viability of substantive due process precedents.

Part I.A of this Note will briefly summarize the concept of substantive due process.[21] Part I.B will then discuss how the Court has applied the "deeply rooted" test for a constitutionally fundamental right in its substantive due process jurisprudence.[22] It will highlight cases where the rights in question were not deeply rooted in our history, tradition and collective conscience, but were nevertheless accorded fundamental right status.[23] For instance, in 1967, in *Loving v. Virginia,* the U.S. Supreme Court held that interracial marriages are encompassed under the fundamental right to marriage, despite the fact that interracial marriages were themselves not deeply rooted in our history and traditions.[24]

Part I.B will also examine broad concepts used by the Court that suggest the "deeply rooted" test is not an exact proxy for the Court's substantive due process jurisprudence.[25] This section will also touch upon some of the scholarship that analyzes DOMA from a substantive due process prospective.[26] Part I.C will explore the Framers' intent with regard to the meaning of liberty.[27] Part I.D will explore whether same-sex marriages could be construed as deeply rooted in our traditions, history, and collective conscience.[28]

Part II will argue that the Court's substantive due process jurisprudence can comfortably accommodate same-sex marriages within the fundamental right to marriage.[29] It will accomplish this by first analyzing, in Part II.A, cases that suggest the Court is using its substantive due process jurisprudence to protect a broader, underlying fundamental right to an individual's self-definitional autonomy—a broad right which includes the narrower right to same-sex marriages.[30] Part II.B will then draw on cases where the "deeply rooted" test was not strictly followed to argue, in the alternative, that the test need not be a barrier to according same-sex marriages fundamental right status even if such marriages are narrowly defined and therefore interpreted as *not* being deeply rooted in our history and traditions.[31]

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[21] *See infra* notes 34–41 and accompanying text.

[22] *See infra* notes 42–137 and accompanying text.

[23] *See infra* notes 79–125 and accompanying text.

[24] *See* 388 U.S. 1, 12 (1967).

[25] *See infra* notes 59–62 and accompanying text.

[26] *See infra* notes 106–107, 112, 134 and accompanying text.

[27] *See infra* notes 138–148 and accompanying text.

[28] *See infra* notes 149–177 and accompanying text.

[29] *See infra* notes 196–250 and accompanying text.

[30] *See infra* notes 196–237 and accompanying text.

[31] *See infra* notes 238–250 and accompanying text. The word "interpreted" is used to emphasize the malleability of history and to reflect the fact that the Court's majority and dissent often reach widely divergent conclusions about the history of the same right. *See*

The Conclusion will then argue that a failure to extend fundamental right status to same-sex marriages—and the corresponding failure to subject DOMA to strict scrutiny under substantive due process[32]—would in fact undermine some of the Court's most notable precedents in this area of law.[33]

I. Background

A. *Substantive Due Process*

The Fifth Amendment to the United States Constitution was adopted in 1791.[34] It prohibits the federal government from depriving any person of life, liberty, or property without due process of law.[35]

The Fifth Amendment has been interpreted by the U.S. Supreme Court to embody a substantive, as well as a procedural, liberty interest in due process.[36] Substantive due process is not limited to the specific guarantees enumerated in the Bill of Rights and its penumbras.[37] The liberty interests accorded strongest protection under substantive due process are those found to be fundamental.[38]

In defining what constitutes a fundamental liberty interest, the Court looks at whether the right in question is deeply rooted in our history, traditions, and evolving collective conscience, such that it is implicit in the Anglo-American concept of ordered liberty.[39] If the right is found to be a fundamental liberty interest under this "deeply rooted" test, statutes or other government actions that infringe upon it are presumptively invalid and subject to strict scrutiny.[40] This sub-

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Bowers v. Hardwick, 478 U.S. 186, 192–94, 199–204 (1986); Roe v. Wade, 410 U.S. 113, 158–66, 173–75 (1973).

[32] This Note will focus exclusively on the fact that same-sex marriages should be included within the fundamental right to marriage protected by substantive due process, which in turn would require that the court subject DOMA to strict scrutiny. It will *not*, however, address the issue of whether the state interests in support of DOMA would be compelling, or whether DOMA is narrowly tailored to achieving those interests, as these arguments have been adequately addressed elsewhere. *See* Kelly, *supra* note 3, at 226–30; Toussaint, *supra* note 12, at 969–72.

[33] *See infra* notes 251–261 and accompanying text.

[34] *See* U.S. Const. amend. V.

[35] *Id.*

[36] *See* Griswold v. Connecticut, 381 U.S. 479, 492–93 (1965) (Goldberg, J., concurring). This analysis also applies to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See id.* (Goldberg, J., concurring).

[37] Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977).

[38] *See* Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978).

[39] *Moore*, 431 U.S. at 503–04; *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

[40] *See Zablocki*, 434 U.S. at 386–87.

stantive due process analysis applies interchangeably to both the states, via the Fourteenth Amendment's Due Process Clause, and to the federal government, via the Fifth Amendment's Due Process Clause.[41]

B. *Substantive Due Process Caselaw*

The Court looks to the history of the right in question when it applies the "deeply rooted" test for fundamental rights under substantive due process.[42] Under this test, a right will be found to be fundamental if its social and legal history demonstrates that it is so entrenched in American culture as to be implicit in our concept of ordered liberty.[43] Whether the historical evidence supports a finding of fundamental status in turn depends on how broadly or narrowly the Court frames the right in question.[44]

1. Rights That Are Deeply Rooted on Their Face

In some cases, the fundamental right in question is clearly deeply rooted in our history and traditions.[45] Among these are family and marriage rights.[46] For instance, in the 1977 decision *Moore v. City of East Cleveland*, the U.S. Supreme Court struck an East Cleveland ordinance that limited the occupancy of a dwelling unit to members of a family, and imposed criminal penalties on those who violated the ordinance.[47] This ordinance recognized only a few categories of related individuals as a family.[48] Plaintiff lived in East Cleveland with her son

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[41] *See, e.g.*, *Moore*, 431 U.S. at 543–44 (White, J., dissenting).

[42] *See id.* at 503–04; *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

[43] *See, e.g.*, *Moore*, 431 U.S. at 503–04.

[44] *See* Bowers v. Hardwick, 478 U.S. 186, 188, 199 (1986) (majority holds that the narrow right to homosexual sodomy is not fundamental, while dissent finds the broader, fundamental right to "be let alone" is really the right at issue); *Moore*, 431 U.S. at 549–50 (White, J., dissenting) (acknowledging that the Court "estimates" what is deeply rooted in our traditions, and that it is arguable what that the deeply rooted traditions of the country are); *Griswold*, 381 U.S. at 486, 527 (majority finds the broad right to privacy in marriage is fundamental, whereas dissent finds the narrow right to use contraceptives is not fundamental).

[45] *See Zablocki*, 434 U.S. at 384. The word "clearly" is used in a relative sense; namely, the rights in these cases are clearly rooted only in comparison to the rights in question in other substantive due process cases. Assessing the traditions of a nation is an inherently subjective task that is less than clear in most cases. *See Moore*, 431 U.S. at 549–50 (White, J., dissenting).

[46] *See, Zablocki*, 434 U.S. at 384; *Moore*, 431 U.S. at 503.

[47] *See* 431 U.S. at 498, 506.

[48] *Id.* at 496 n.2.

and her two grandsons, who were first cousins rather than brothers.[49] She received a notice of violation from the city, stating that one of her grandchildren was an illegal occupant, and directing her to comply with the ordinance.[50] When she failed to remove her grandson from her home, the city filed criminal charges.[51] The Court reasoned that the Cleveland ordinance sliced deeply into the family itself, thus infringing upon the freedom of personal choice in matters of marriage and family life, which are fundamental liberties protected by substantive due process.[52]

The *Moore* Court defined "family" broadly to encompass Mrs. Moore's family arrangement and other extended families comprised of relatives of the same degree of kinship.[53] The Court cited historical evidence that the institution of the family is deeply rooted in our nation's traditions and history.[54] The Court pointed out that a tradition of uncles, aunts, cousins, and grandparents sharing a household along with parents and children has deep roots in our history.[55] Justices Brennan and Marshall pointed out in their concurring opinion that extended and non-nuclear families are particularly prevalent among minority groups.[56] They stressed that the Constitution cannot be interpreted to enable the government to impose white suburbia's cultural myopia upon the rest of the population.[57]

In addition, the *Moore* Court stressed that certain rights associated with the family have been protected as fundamental rights because they bear upon an individual's freedom of choice in personal matters relating to individual fulfillment.[58] The Court emphasized that substantive due process represents a balance that the Court has

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[49] *Id.* at 496.

[50] *Id.* at 497.

[51] *Id.*

[52] *See Moore*, 431 U.S. at 498–99. *But see* Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 8–10 (1974) (upholding, under rational-basis scrutiny, an ordinance that imposed limits on the types of groups that could occupy a single dwelling unit, but expressly allowed all who were related by blood, adoption or marriage to live together). The *Moore* Court distinguished *Belle Terre* on the ground that the *Belle Terre* ordinance affected only unrelated individuals, and that it promoted "family needs" and "family values," thereby not infringing upon the fundamental right to personal choice in matters of marriage and family life. *Moore*, 431 U.S. at 498–99.

[53] *See id.* at 503–06.

[54] *Id.* at 503–04.

[55] *Id.* at 504.

[56] *Id.* at 510 (Brennan, J., concurring).

[57] *Moore*, 431 U.S. at 507–08 (Brennan, J., concurring).

[58] *See id.* at 500–01, 504 n.11 (citing with approval a commentator's suggestion that *Griswold* is best understood as a reaffirmation of the Court's continuing obligation to protect modes of individual fulfillment which are at the heart of a free society).

struck between the liberty of the individual and the demands of organized society.[59] The liberty guaranteed by due process, the Court reasoned, is neither limited to the specific guarantees of the Constitution, nor is it a series of isolated rights.[60] It concluded that protected individual liberty is a rational continuum that includes freedom from all substantial arbitrary impositions and purposeless restraints by the government.[61] The Court then hinted that the "deeply rooted" test is a guide rather than a bright-line rule in defining fundamental rights under substantive due process.[62]

Similarly, in 1978, in *Zablocki v. Redhail*, the U.S. Supreme Court struck down a Wisconsin statute that required court approval before any resident having child-support obligations could marry.[63] Plaintiff was an indigent Wisconsin resident who could not afford to pay child support to his illegitimate child, and therefore was denied permission to marry another woman.[64] The Court reasoned that the freedom to marry is a fundamental liberty interest of all individuals protected by the Due Process Clause.[65] Thus, restrictions on an individual's ability to enter into a marriage are subject to strict scrutiny.[66] The Court also suggested that direct legal obstacles in the path of persons desiring to get married are subject to strict scrutiny.[67]

In his concurring opinion, however, Justice Powell cautioned that the Court has yet to hold that all regulations touching upon marriage implicate a fundamental right.[68] Justice Powell pointed to state regulations banning homosexuality as an example of historical state restrictions on marriage, and implied that such restrictions should not be subject to strict scrutiny.[69]

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[59] *Id.* at 501.

[60] *Id.* at 502.

[61] *Id.*

[62] *See Moore*, 431 U.S. at 501, 503 (emphasizing that substantive due process represents a balance that the Court has struck between the liberty of the individual and the demands of organized society, and stating that the limits on substantive due process come not from arbitrary lines but from a respect for history and the basic values that underlie our society); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (noting that Constitutional interpretation involves reasoned judgment, and that due process has not been reduced to any simple formula).

[63] *See* 434 U.S. 374, 386, 390–91 (1978).

[64] *Id.* at 376–78.

[65] *Id.* at 384.

[66] *Id.* at 385–86.

[67] *See id.* at 387 n.12.

[68] *Zablocki*, 434 U.S. at 397 (Powell, J., concurring in the judgment).

[69] *See id.* at 399 (Powell, J., concurring in the judgment).

In 1987, in *Turner v. Safley*, the U.S. Supreme Court struck a prison regulation that restricted inmates' right to marry.[70] The Court found that the regulation infringed on the inmates' residual liberty interest in the fundamental right to marriage.[71] Even though the Court recognized that marriage is a fundamental right, the Court applied a lower standard of scrutiny because the state had a valid penological interest in restricting the liberty of criminal inmates.[72] Despite this strong state interest, however, the Court reasoned that many important attributes of marriage remained such that the regulation in question must be struck.[73]

In *Turner*, the Court protected the inmates' right to marriage despite the fact that it allowed the state to restrict the inmates' sexual freedom.[74] The Court found that elements of marriage such as emotional support, public commitment, spiritual significance and personal dedication remain intact even for criminals whose liberty interests are legitimately curtailed by the penal system.[75]

The Court purported to be applying a lower standard of scrutiny in *Turner*.[76] Rather than accepting the state's stated purpose in enacting the regulation, however, the Court inquired into *actual* penological interests and to ready alternatives that would fully accommodate the prisoners' marriage interests at a *de minimis* cost to the valid penological interests.[77] *Turner* demonstrates that the Court assumes that the right to enter into a marriage is fundamental and deserves great protection even in cases where the individual's liberty interests are already compromised.[78]

2. Rights That Are *Not* Deeply Rooted on Their Face: Linking the Narrowly-Defined Right to a Broader Right's Deep Roots to Accord It Fundamental-Right Status

Unlike the above cases, however, some of the Court's precedents extend fundamental status to rights that are not, on their face, deeply rooted in our history and traditions.[79] To accomplish this, the Court

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[70] 482 U.S. 78, 81 (1987).

[71] *See id.* at 95.

[72] *Id.* at 81, 95.

[73] *See id.* at 81, 95–96 (noting that the applicable standard of review is whether the marriage regulation is reasonably related to a legitimate penological objective).

[74] *Id.* at 95–96.

[75] *Turner*, 482 U.S. at 95–96.

[76] *See id.* at 89.

[77] *See id.* at 89–91.

[78] *See id.* at 116 (Stevens, J., concurring in part and dissenting in part).

[79] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); *Griswold*, 381 U.S. at 483–86.

analyzes the history of a broader, more generalized right in applying its "deeply rooted" test.[80] The Court does this when the right at bar, if narrowly defined, would not be deeply rooted in our history and traditions.[81] Thus, by grounding its analysis on the broader right's deep roots, the Court holds as fundamental the narrower right that is actually at bar.[82]

For instance, in the 1965 decision *Griswold v. Connecticut*, the U.S. Supreme Court held that the fundamental right to privacy surrounding the marriage relationship includes the right for married couples to use contraceptives.[83] In *Griswold*, a Connecticut statute imposed a fine or imprisonment on any person who used contraceptive drugs or devices to prevent conception.[84]

The *Griswold* Court grounded its holding not on a narrow right to use contraceptives, but on the broader right of privacy in one's associations, particularly marriage.[85] It reasoned that marriage should be protected because it is an association that promotes a way of life, a harmony in living, and a bilateral loyalty.[86] Justice Goldberg noted in concurrence that the right to privacy in marriage is fundamental and deeply rooted in our society.[87] Justice White defined the right at issue in *Griswold* as a fundamental right to be free of regulation of the intimacies of the marital relationship.[88] By couching the fundamental right in question as that to privacy in marriage, the Court recognized as fundamental the narrower, derivative right of married couples to use contraception.[89] The Court did so despite the historical moral disapproval of contraceptive use.[90] Thus, to reach the result in *Griswold*, the plurality used the history of the right to privacy in marriage,

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[80] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[81] *See Loving*, 388 U.S. at 6 (noting that numerous states traditionally and contemporaneously outlawed interracial marriages); *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

[82] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86 (noting that if the Court does not extend constitutional protection to the peripheral rights, the specific rights would be less secure).

[83] *See* 381 U.S. at 485–86.

[84] *Id.* at 480.

[85] *See id.* at 483–86.

[86] *Id.* at 486.

[87] *Id.* at 491 (Goldberg, J., concurring).

[88] *Griswold*, 381 U.S. at 502–503 (White, J., concurring in the judgment).

[89] *Id.* at 486.

[90] *See id.* at 505 (White, J., concurring in the judgment) (noting that Connecticut disapproved of the use of contraceptives for the purposes of preventing conception on moral grounds, and had proscribed such use for over 80 years).

and *not* the history of the narrower right to contraceptive use, as the focus of its analysis under the "deeply rooted" test.[91]

The *Griswold* Court reasoned that the right to privacy in marriage is fundamental because it is necessary to an individual's pursuit of happiness through her or his beliefs, thoughts, emotions and sensations.[92] The Court implied that it is proper for substantive due process to protect rights that ensure conditions favorable to individuals' pursuit of happiness and to secure individuals' right to be let alone, because the Framers intended the Constitution to provide such protections.[93] The Court cautioned, however, that its holding in no way undermined a state's proper regulation of what it termed "sexual promiscuity," which included same-sex sexual conduct, and a state's right to determine who may marry.[94]

Similarly, in *Loving v. Virginia*, a 1967 decision, the U.S. Supreme Court struck down a Virginia anti-miscegenation statute, holding it violated the due process liberty interest in the freedom to marry.[95] The Virginia statute in *Loving* imposed a felony conviction on white persons who married a person of another race, and automatically voided all marriages between a white person and what it termed a "colored person."[96] The Lovings, a white man and a black woman, were married in the District of Columbia in June of 1958 and returned to Virginia where they established their marital home.[97] They were indicted for violating Virginia's ban on interracial marriages and sentenced to one year in jail.[98] The trial judge suspended the sentence for 25 years on condition that the Lovings leave the state and not return to Virginia together for 25 years.[99]

The Court upheld the Lovings' right to marry despite the historical and contemporaneous opposition to interracial marriages in the U.S.[100] The Court struck the statute primarily on Equal Protection grounds, because it constituted invidious racial discrimination on its face.[101] The Court also held, however, that Virginia's anti-

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[91] *See id.* at 486.

[92] *See id.* at 494 (Goldberg, J., concurring).

[93] *See Griswold*, 381 U.S. at 494–95 (Goldberg, J., concurring).

[94] *Id.* at 499 (Goldberg, J., concurring).

[95] *See* 388 U.S. at 12.

[96] *Id.* at 4.

[97] *Id.* at 2.

[98] *Id.* at 3.

[99] *Id.*

[100] *See Loving*, 388 U.S. at 6, 12 (mentioning that sixteen states prohibited and criminalized interracial marriages at the time of this decision, and noting that penalties for miscegenation had been common since the colonial period).

[101] *Id.* at 8.

miscegenation statute violated the Due Process Clause.[102] The Court reasoned that the freedom to marry the person of one's choosing had long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free people.[103] It further stated that the freedom to marry or not to marry resides with the individual and cannot be infringed upon by the state.[104]

The *Loving* Court thus concluded that an individual's fundamental freedom of choice to marry includes the right to marry interracially, despite the historical opposition to this particular, nontraditional form of marriage.[105] The Court accomplished this by framing the right as the broader right to marriage in lieu of focusing on the narrower right to marry interracially.[106] Therefore, the *Loving* Court was able to use the deep historical roots of the broader right to support the extension of fundamental right status to its narrower variant.[107]

3. Rights That Are *Not* Deeply Rooted on Their Face: Selectively Using the Right's Historic Roots to Accord It Fundamental-Right Status

In other cases, the U.S. Supreme Court upheld rights that were not deeply rooted in our history, without attempting to frame them broadly.[108] In order to uphold a right as fundamental in these cases, the Court discounted the problematic historical evidence.[109] It instead

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[102] *Id.* at 12.

[103] *Id.*

[104] *Id.*

[105] *See Loving*, 388 U.S. at 6, 12.

[106] *See id.* at 12. Some commentators who analyzed DOMA under substantive due process mentioned the Court's willingness to accord fundamental right status to interracial marriages in *Loving* despite the fact that such marriages were *not* deeply rooted in our history and traditions. *See* Toussaint, *supra* note 12, at 940. One commentator also noted that the *Loving* Court accomplished this by framing the right in question as the right to marry a person of one's choosing. *See id.* Commentators have stopped short of arguing, however, as this Note does, that same-sex marriages can be accorded fundamental right status under substantive due process *even if* they are narrowly defined as *same-sex* marriages, (as opposed to *Loving's* broader framing of the right in question as the right to marry a person of one's choosing) and found *not* to be deeply rooted in our history and traditions. *See id.*

[107] *See Loving*, 388 U.S. at 12; *see also* Toussaint, *supra* note 12, at 940 (analogizing interracial marriages in *Loving* to same-sex marriages and arguing that the analysis of DOMA's constitutionality under substantive due process should likewise focus on the broader right to marry and to choose one's spouse, and not on the narrower *variant* form of marriage that does not have deep roots).

[108] *See Casey*, 505 U.S. at 846–50; Roe v. Wade, 410 U.S. 113, 158–66 (1973).

[109] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66.

selectively focused on the parts of history that supported the inference that our evolving conscience is increasingly accepting the right in question as implicit in the concept of ordered liberty.[110] Namely, the Court focused on both the historical inconsistencies and on the changes in the history of the right in question that showed a liberalizing trend toward acceptance of that right.[111] This use of history comports with the view of some commentators, who have pointed out the inconsistent and diverse nature of history and traditions, and the fact that traditions are in a constant state of flux.[112]

For instance, in 1973, in *Roe v. Wade*, the U.S. Supreme Court held that the constitutional guarantee of personal privacy includes a woman's fundamental right to choose to have an abortion.[113] In *Roe*, a young pregnant Texas woman challenged a Texas statute that criminalized abortion except in limited circumstances.[114] The Court reasoned that the woman's choice of whether to bear a child lies within the zones of privacy that are deemed fundamental or implicit in the concept of ordered liberty.[115] To support its point about the impact of this deeply personal choice on a woman's liberty, the Court pointed to the psychological harm, mental and physical stress, and continuing stigma that may result from bearing an unwanted child.[116]

The *Roe* Court recognized a woman's liberty interest in an abortion as protected under substantive due process despite deeply entrenched societal and religious convictions against abortion.[117] The

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[110] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66; *see also Moore*, 431 U.S. at 501 (stating that the Court should look both to the traditions that Americans have stuck to and to the traditions that we have broken in determining what is implicit in our concept of ordered liberty); *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

[111] *See Casey*, 505 U.S. at 846–50 (stating that in applying the "deeply rooted" test, the Court must look not only to the traditions that Americans have stuck to, but also to the traditions that we have broken); *Roe*, 410 U.S. at 140, 147 n.41 (specifically noting a "more liberal trend" in American laws on abortion in its analysis of the history of the right to abortion).

[112] *See* Kelly, *supra* note 3, at 220–21; *see also Moore*, 431 U.S. at 549–50 (White, J., dissenting) (acknowledging that the Court "estimates" what is deeply rooted in our traditions, and that it is arguable what the deeply rooted traditions of the country are).

[113] 410 U.S. at 153, 165 (also noting that after the first trimester the state's interests become sufficiently compelling to enable it to regulate some aspects of abortion). *Roe* has been modified by *Casey*, which applies an "undue burden" test in lieu of strict scrutiny in abortion cases. *See Casey*, 505 U.S. at 874–77.

[114] *Roe*, 410 U.S. at 117–18.

[115] *Id.* at 153.

[116] *Id.*

[117] *See id.* at 136–39 (noting that English statutory law made abortion of a quick fetus a capital crime, and pointing to American state legislation that criminalized abortion in the nineteenth century). The Court also pointed to some conflicting history regarding the social acceptance of abortion: Greek and Roman law afforded little protection to the un-

majority in *Roe* heavily relied on the fact that the common law did not criminalize abortions prior to "quickening" to support its finding of a fundamental right to a pre-viability abortion.[118] The dissent, on the other hand, specifically pointed to the majority's selective use of historical evidence, and emphasized that abortion had been criminalized under eighteenth century common law, and that contemporary society continued to debate the morality of abortion.[119]

Likewise, in the 1992 decision *Planned Parenthood v. Casey,* the U.S. Supreme Court reaffirmed a woman's fundamental liberty interest in choosing to have an abortion.[120] In *Casey,* abortion clinics and physicians challenged, on due process grounds, a Pennsylvania statute that, subject to limited exceptions, restricted abortion by requiring a 24-hour waiting period, parental consent for minor women's abortions, and by requiring that a married woman notify her husband regarding the abortion.[121] The Court reasoned that a state may not unduly burden a woman's right to choose an abortion before fetal viability.[122] The *Casey* Court grounded this right on the broad proposition that at the heart of the liberty interest is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[123] In reaching its decision, the *Casey* Court heavily relied on stare decisis and on the country's reliance upon *Roe v. Wade* over the previous thirty years.[124] This decision exemplifies the Court's use of historical changes that imply a societal evolving conscience to uphold certain rights as fundamental.[125]

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born, ancient religion did not bar abortion, and the common law did not ban abortion prior to "quickening." *Id.* at 130, 132–33. It also pointed to a contemporaneous, "more liberal trend" in laws regarding abortion to bolster its conclusion that the right to abortion is a fundamental right. *See id.* at 147.

[118] *See id.* at 136–41.

[119] *See Roe,* 410 U.S. at 174–75 (Rehnquist, J., dissenting).

[120] *See* 505 U.S. at 846–51.

[121] *Id.* at 844–45.

[122] *Id.* at 874–77. The Court's use of an "undue burden" test instead of strict scrutiny was designed to address the peculiar fact that a woman is not alone in her pregnancy. *See id.* This suggests that the majority intended to limit the application of this slightly lower standard of scrutiny to abortion, thus retaining the strict scrutiny standard with regard to other substantive due process fundamental rights. *See id. But see id.* at 988 (Scalia, J., dissenting) (arguing that the "undue burden" test employed by the majority establishes a dangerous precedent that could be applied to any fundamental right in the future).

[123] *See id.* at 851.

[124] *See id.* at 846, 867.

[125] *See Casey,* 505 U.S. at 846–50.

4. Rights That Are *Not* Deeply Rooted on Their Face: Refusing to Accord Fundamental-Right Status

In contrast, the Court has sometimes refused either to frame a right broadly or to focus on the right's conflicting history in order to accord it fundamental status.[126] For example, in the 1986 case of *Bowers v. Hardwick*, the U.S. Supreme Court concluded that homosexual sodomy[127] is not a fundamental interest, and therefore applied minimum rationality scrutiny to a statute designed to curb such conduct.[128] The plaintiff in *Bowers* was charged with violating Georgia's statute that criminalized sodomy between any two persons.[129] On its face, the Georgia statute criminalized sodomy for both same-sex and opposite-sex couples.[130] Seminal to this decision, however, was the Court's reasoning that *same-sex* sodomy was not deeply rooted in our nation's history, and was in fact historically criminalized in various states.[131] The Court reasoned that there was no connection between homosexual activity and the fundamental liberty interests in family, marriage, and procreation.[132] The Court concluded that because there was no fundamental right to homosexual sodomy, the proper standard of review was minimal scrutiny.[133]

Justice Blackmun pointed out in dissent,[134] however, that *Bowers* should be properly regarded as a case about an individual's fundamental right of intimate association, which underlies the substantive due process right to privacy.[135] Justice Blackmun also reasoned that the constitutionally protected right to make decisions about sexual relations is rendered empty if a gay man or lesbian is given no real choice but a life without any physical intimacy.[136] Thus, Justice Blackmun would have framed the right in question broadly in order to use

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[126] *See Bowers*, 478 U.S. at 192–94, 200–01.

[127] Note that this terminology is used because it is the verbiage used by the *Bowers* Court in its opinion.

[128] *See id.* at 191–92.

[129] *Id.* at 187–88.

[130] *Id.*

[131] *Id.* at 194 n.5–6.

[132] *See Bowers*, 478 U.S. at 191. Commentators have distinguished *Bowers* from DOMA and same-sex marriage cases on the grounds that *Bowers* did not involve marriage, as the court specifically notes in the above-paraphrased reasoning. *See* Kelly, *supra* note 3, at 230–31.

[133] *See Bowers*, 478 U.S. at 190.

[134] *Bowers* has been highly criticized by scholars as wrongly decided, and even Justice Powell, who was the deciding vote, acknowledged that he should have voted differently, and that the dissent's position should have prevailed. *See* Kelly, *supra* note 3, at 232.

[135] *Bowers*, 478 U.S. at 199–201 (Blackmun, J., dissenting).

[136] *Id.* at 203 n.2.

the broad right's deep roots in history to extend fundamental right status to the narrower right to homosexual sodomy.[137]

C. *Framer's Intent*

This nation was founded, and the U.S. Constitution drafted, on the fundamental underlying premise that individuals are free to choose for themselves how to lead their own lives and have the right to be let alone.[138] The Framers of the Constitution sought to secure to individuals conditions favorable to the pursuit of happiness, which include protecting an individual's choice in forming beliefs, thoughts, emotions, and sensations.[139] As the U.S. Supreme Court held, a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned simply because it is different.[140]

The Framers' broad conceptualization of liberty in turn imbues the Court's substantive due process analysis.[141] The Framers did not intend for the meaning of liberty to be constrained to the specific rights enumerated in the Bill of Rights.[142] Alexander Hamilton was concerned about adopting a Bill of Rights because of the danger that it would contain exceptions to powers, which are not granted, and that such enumerated rights could later "furnish, to men disposed to usurp, a plausible pretence for claiming that power."[143] Likewise, James Madison noted that the strongest argument against the Bill of Rights was the danger that enumerating particular exceptions to the grant of power would disparage those rights that were not enumerated.[144]

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[137] *See id.* at 199–200. Note that the methodology advocated by Justice Blackmun in *Bowers* is the same methodology used by the Court in *Griswold*. *See Griswold*, 381 U.S. at 483–86.

[138] *See Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

[139] *Id.* at 207 (quoting Stanley v. Georgia, 394 U.S. 557, 564–65 (1969)).

[140] Wisconsin v. Yoder, 406 U.S. 205, 224 (1972); *see also* J.S. MILL, ON LIBERTY 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859) (arguing that the government can only legitimately interfere with an individual's liberty to 'live his own life his own way' if the individual exercises his liberty in a way that either harms or impinges upon the liberty of others).

[141] *See Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting); *Roe*, 410 U.S. at 168 (Stewart, J., concurring) (reasoning that in a Constitution for a free people, the meaning of liberty must be broad); *Griswold*, 381 U.S. at 488–90 (Goldberg, J., concurring).

[142] *See Griswold*, 381 U.S. at 490 (Goldberg, J., concurring); *see also* U.S. CONST. amend. IX (stating that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people).

[143] The Federalist No. 84 (Alexander Hamilton).

[144] *Griswold*, 381 U.S. at 489–90 (Goldberg, J., concurring) (quoting James Madison, I ANNALS OF CONGRESS 439 (Gales and Seaton ed. 1834)).

Thus, the words of the Framers lend support to the view that an individual's liberty interest should be broadly construed, and that specific rights need not be enumerated in the Constitutional text to be deemed fundamental.[145] The Framers purposefully left the concept of liberty open to gather meaning from experience, because they knew that only a stagnant society remains unchanged.[146] More importantly, the Framers added the Ninth Amendment to the U.S. Constitution to make it clear that the rights enumerated in the Bill of Rights should not be used to disparage a broader meaning of liberty, because the people retained other, non-enumerated rights.[147] Thus, it is proper that the Court account for changes in our traditions and evolving conscience when applying the "deeply rooted" test for fundamental rights.[148]

D. *Same-Sex Marriages: "Deeply Rooted"? In whose tradition?*

If we narrowly define the right infringed upon by DOMA as the right to same-sex marriages, it could be challenging to argue that such a right is deeply rooted in our history, traditions, and collective conscience, or that such a right is implicit in the concept of ordered liberty.[149] Nevertheless, this argument would turn on whose history, traditions, and collective conscience one analyzes.[150]

As one commentator points out, the United States boasts a number of distinct and conflicting traditions.[151] Several ancient cultures, including Egypt, classical Greece, imperial China, republican and imperial Rome, as well as some modern cultures such as certain societies in Africa, Asia, and Australia, have accepted same-sex marriage.[152] Furthermore, some Native North American tribes not only traditionally accepted, but fully institutionalized, gay relationships.[153]

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[145] *See id.*

[146] *See Roe*, 410 U.S. at 169 (Stewart, J., concurring) (quoting Frankfurter, J. in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949)).

[147] *See* U.S. CONST. amend. IX (stating that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people).

[148] *See Moore*, 431 U.S. at 501 (stating that the Court should look both to the traditions that Americans have stuck to and to the traditions that we have broken in determining what is implicit in our concept of ordered liberty).

[149] *See Bowers*, 478 U.S. at 192; *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

[150] *See* Kelly, *supra* note 3, at 220–21.

[151] *See id.*

[152] *See id.*

[153] *See* Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America*, *in* SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 80 (Sherry B. Ortner & Harriet Whitehead eds., 1981).

Moreover, some American states, such as Hawaii and Vermont, have either attempted to fully recognize same-sex marriages or have at least established civil unions to recognize same-sex relationships.[154] More importantly, the Supreme Court of Georgia struck down the Georgia statute in question in *Bowers v. Hardwick* as invalid under the right of privacy protected by the Georgia constitution.[155] The Georgia Supreme Court grounded its holding on the state constitution to avoid being bound by *Bowers*.[156] Furthermore, as commentators have pointed out, there are inconsistencies within the Judeo-Christian tradition's treatment of same-sex marriages.[157]

On the other hand, as the *Bowers* majority pointed out, there are strains of the Judeo-Christian tradition, such as the modern Roman Catholic Church, that disapprove of individuals who engage in same-sex sexual conduct.[158] Additionally, sodomy was a criminal offense at common law and a statutory offense in many American states.[159] Even so, these traditions are themselves conflicting: sodomy was criminalized at common law, but as the dissent in *Bowers* points out, such statutes criminalized sodomy for *both* gay and non-gay couples, and did not criminalize same-sex sexual relationships *per se*.[160] Thus, although a selective reading of these common law traditions provides support for the proposition that same-sex relationships were not historically accepted, a thorough survey reveals a far more complex, and less decisive, truth.[161]

Moreover, our legal history, through the Court's own opinions in cases such as *Griswold*, *Zablocki* and *Bowers*, has affirmed states' rights to "say who may marry" and to forbid sexual practices associated with lesbians and gay men.[162] One can argue, however, that our society's

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[154] *See* VT. STAT. ANN. tit. 15, § 1204 (1999); *Baehr*, 852 P.2d at 67 (holding that law denying same-sex couples the right to marry should be subject to strict scrutiny). Although the Hawaii Supreme Court attempted to recognize same-sex marriages, the Hawaii legislature overturned *Baehr* in 1998 by amending the state's constitution to enable the legislature to reserve marriage exclusively to opposite-sex couples. *See* HI CONST. Art. 1, § 23 (1998); *see also* Vicki L. Armstrong, *Welcome to the 21st Century and the Legalization of Same-Sex Unions*, 18 T.M. COOLEY L. REV. 85, 94–95 (2001).

[155] *See* Powell v. State, 510 S.E.2d 18, 21, 24 (Ga. 1998) (holding that unforced sexual behavior conducted in private between consenting adults is protected by the right to privacy under Georgia's constitution).

[156] *See Powell*, 510 S.E.2d at 22.

[157] *See* Kelly, *supra* note 3, at 220–21.

[158] *See Bowers*, 478 U.S. at 192–94.

[159] *See id.* at 193–94.

[160] *See id.* at 216 n.8 (Stevens, J., dissenting).

[161] *See id.*

[162] *See Bowers*, 478 U.S. at 190; *Zablocki*, 434 U.S. at 396–98 (Powell, J., concurring in the judgment); *Griswold*, 381 U.S. at 499 (Goldberg, J., concurring).

evolving conscience has become more receptive to same-sex marriages since these decisions.[163] Some states have shown an increasing openness toward institutionalizing committed same-sex relationships.[164] In addition, major U.S. corporations and several municipalities have begun to recognize same-sex relationships as they do opposite-sex relationships for employee benefit purposes.[165] These legal and societal developments demonstrate that times are changing, and that our conscience is evolving with regard to same-sex relationships.[166]

Secondly, there is strong support for a right to self-definitional autonomy, which encompasses the right to same-sex marriages.[167] This broader right could encompass same-sex marriages because same-sex marriages, like the marriages in *Loving* and *Zablocki*, involve the freedom to marry the person of one's choosing.[168] Furthermore, the right to self-definitional autonomy encompasses same-sex marriages because these marriages, like the marriage in *Turner*, involve elements such as emotional support, public commitment, spiritual significance and personal dedication.[169] As Justices Brennan and Marshall warned in *Moore*, we must not interpret the Constitution to impose a majority's cultural myopic views regarding proper family forms on the entire population.[170] This is particularly true in light of the fact that the Constitution's very structure was deliberately crafted to protect against a tyranny of the majority.[171] Thus, same-sex marriages in-

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[163] *See* Armstrong, *supra* note 154, at 85–90; *see also supra* notes 154–156 and accompanying text.

[164] *See* Armstrong, *supra* note 154, at 89–90 (pointing to the Vermont Civil Union Act, and to Alaska, Hawaii, and Vermont decisions against limiting marriage to opposite-sex couples).

[165] *See id.* at 107–09.

[166] *See id.* at 108; *see also Moore*, 431 U.S. at 501 (noting that the Court looks both to the traditions that Americans have stuck to and to the traditions that we have broken in determining what is implicit in our concept of ordered liberty).

[167] *See Casey*, 505 U.S. at 851; *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

[168] *See Zablocki*, 434 U.S. at 383–84; *Loving*, 388 U.S. at 12; *see also Griswold*, 381 U.S. at 486 (marriage is protected because it is an association that promotes a way of life, a harmony in living, and a bilateral loyalty).

[169] *See Turner*, 482 U.S. at 95–96; Toussaint, *supra* note 12, at 933–34 (noting that many different family forms, including same-sex relationships, can perform family functions and embody marital attributes).

[170] *See Moore*, 431 U.S. at 507–08 (Brennan, J., concurring).

[171] *See* THE FEDERALIST NOS. 10, 51 (James Madison) (reasoning that the Constitution creates a will in the community independent of, and as a check upon, the majority, lest the rights of individuals or the minority be imperiled by the majority); THE FEDERALIST NO. 68 (Alexander Hamilton) (noting that it is the role of the judiciary to constrain majoritarian inclinations that are inconsistent with the Constitution).

volve choices that are critical to an individual's self-definitional autonomy.[172]

The history and traditions upon which this country was built, as well as the Court's own jurisprudence, provide support for the proposition that an individual has a fundamental right to make choices that are critical to self-definition, and to live "his own life his own way."[173] This is particularly true in the areas of family life, intimate associations, and marriage.[174]

As illustrated by the Court in *Turner*, even a criminal whose liberty interests are legitimately curtailed by the state's penological interest retains a fundamentally protected residual interest in marriage, which is a choice that is critical to self-definition.[175] Furthermore, the *Bowers* Court itself stated that a major reason that the homosexual sodomy at bar did not involve a fundamental right was because it was not associated with family life and marriage.[176] This language from *Bowers* leaves open the possibility that even the *Bowers* majority might have come out differently if the conduct at issue had been associated with marriage rights.[177]

II. Malleable Use of History and the Right to Self-Definitional Autonomy: A Case for Striking Down DOMA Under Substantive Due Process

Substantive due process has been used extensively to protect the fundamental right to privacy, including the fundamental right to marriage.[178] The Defense of Marriage Act is a particularly intriguing statute to analyze under the Due Process Clause, because it is a prism through which the U.S. Supreme Court's substantive due process jurisprudence can be scrutinized and arguably undermined.[179] Namely, DOMA's constitutionality under substantive due process turns solely on the Court's willingness to accord fundamental-right status to the controversial right to same-sex marriage.[180] The Court's choice in this matter is *not* constrained by its prior substantive due process jurispru-

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[172] *See Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting); *Moore*, 431 U.S. at 502.

[173] *See Casey*, 505 U.S. at 851; *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting); Mill, *supra* note 140, at 13.

[174] *See Moore*, 431 U.S. at 503 n.11; *Griswold*, 381 U.S. at 486.

[175] *See Turner*, 482 U.S. at 95–96.

[176] *See Bowers*, 478 U.S. at 191.

[177] *See id.*

[178] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[179] *See infra* notes 246–250 and accompanying text.

[180] *See infra* notes 246–261 and accompanying text.

dence.[181] In fact, if the Court does *not* accord same-sex marriages fundamental-right status, it would undermine its own precedents by calling the continued viability of these precedents' methodologies into question.[182]

While the Court has typically been steadfast in protecting the fundamental right to marriage, it has been less resolute in protecting other aspects of intimate choices, such as abortion, as fundamental rights.[183] Yet, cases such as *Planned Parenthood v. Casey* provide some of the strongest language in support of a broad conceptualization of the fundamental right to privacy in intimate choices, which is deemed essential to the concept of ordered liberty.[184] Furthermore, the Court has in the past accorded fundamental right status to things that are not deeply rooted in our history and traditions, such as interracial marriages.[185] Although the Court does not admit it, it is flexible in applying its "deeply rooted" test when certain liberties that are essential to one's intimate associations are at bar.[186]

As demonstrated in Part I.D, same-sex marriage can be construed as "deeply rooted" in our history and traditions.[187] This is because the right to same-sex marriage is encompassed in the broader right to self-definitional autonomy, which is in turn deeply rooted in our history and traditions.[188]

Part II.A explores the Court's use of deeply rooted, broadly defined rights to extend fundamental right status to their narrower, not deeply rooted variants.[189] The right infringed upon by DOMA should be construed broadly, either as the right to enter into a marriage with a person of one's choosing, or as the right to self-definitional autonomy.[190] This construction of the right in question is consistent with the Court's precedents in this area of law, and would

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[181] *See infra* notes 246–261 and accompanying text.

[182] *See infra* notes 259–261 and accompanying text.

[183] *See* Planned Parenthood v. Casey, 505 U.S. 833, 874–77 (1992) (weakening significantly the fundamental right status accorded to abortion under *Roe v. Wade* by lowering its standard of review from strict scrutiny to an "undue burden" test).

[184] *See Casey*, 505 U.S. at 851.

[185] *See Loving*, 388 U.S. at 12.

[186] *See Casey*, 505 U.S. at 846–50; Roe v. Wade, 410 U.S. 113, 158–66 (1973); *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[187] *See supra* notes 149–177 and accompanying text.

[188] *See supra* notes 164–173 and accompanying text.

[189] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 486.

[190] *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); *Loving*, 388 U.S. at 12.

extend fundamental right status to the narrower, variant right to enter into a same-sex marriage.[191]

Alternatively, Part II.B argues that even if DOMA burdens only a narrowly construed right to same-sex marriage, the Court's substantive due process precedents still support a finding that DOMA infringes on a fundamental right.[192] Precedents demonstrate that the Court has accorded fundamental right status to rights that were not deeply rooted in our history and traditions.[193] These rights, like the right to enter into a same-sex marriage, were arguably becoming more accepted by our societal evolving conscience, and were thereby accorded protection as fundamental rights.[194] Furthermore, the "deeply rooted" test for fundamental rights has been used as a guide rather than as an exclusionary bright-line rule in the Court's substantive due process jurisprudence.[195]

A. *Broadly Construed Rights*

> *In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed.*
>
> —Justice Stewart[196]

As construed by the U.S. Supreme Court, the fundamental right to marriage is sufficiently broad to encompass same-sex marriage.[197] In the area of privacy rights, the Court has consistently reasoned that there is an underlying right of individual autonomy of choice in areas that are essential to one's self-definition.[198]

In this view, the Court is not merely protecting scattered, unrelated rights that it sees as fundamental to the concept of ordered liberty.[199] It is instead protecting complementary rights that collectively form the deeper, underlying right that the Court is truly striving to protect: the right to an individual's self-definitional autonomy.[200] This

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[191] *See Loving*, 388 U.S. at 12.

[192] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66.

[193] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66.

[194] *See Casey*, 505 U.S. at 850; *Roe*, 410 U.S. at 158–59, 163, 165.

[195] *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[196] *Roe*, 410 U.S. at 168 (Stewart, J., concurring).

[197] *See* Kelly, *supra* note 3, at 219–20; Toussaint, *supra* note 12, at 952.

[198] *See Casey*, 505 U.S. at 851; *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

[199] *See Roe*, 410 U.S. at 169 (Stewart, J., concurring) (noting that liberty is not a series of isolated points priced out in terms of specific, textually enumerated rights, but that it is instead a rational continuum that includes a freedom from all substantial arbitrary impositions and purposeless restraints).

[200] *See Casey*, 505 U.S. at 851 (recognizing individuals' right to form their own concept of existence); *Roe*, 410 U.S. at 169.

broad, underlying right encompasses individuals' right to choose their marriage partners.[201] This conceptualization of the underlying fundamental right finds support in both the Court's precedents and in the intent of the Framers.[202]

1. Broad Language

The U.S. Supreme Court's decisions involving rights that are encompassed under the fundamental right to privacy can be interpreted as protecting the individual's underlying right to autonomy in self-definition.[203] The *Griswold v. Connecticut* Court emphasized the fact that marriage is an association of people that promotes a way of life, a harmony in living, and a bilateral loyalty.[204]

Likewise, the *Casey* Court reasoned that a woman's constitutionally protected right to a pre-viability abortion is grounded on the fact that at the heart of the liberty interest is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[205] The Court in *Moore v. City of East Cleveland* noted that rights are protected as fundamental because they bear on an individual's freedom of choice in matters relating to individual fulfillment.[206] This broad language supports the proposition that an individual's self-definitional autonomy should be protected as fundamental and should encompass a wide range of subsidiary rights that are essential to that right.[207]

In *Bowers v. Hardwick*, a case which many people, including Justice Powell—who was the deciding vote—have admitted was wrongly decided,[208] the dissent pointed to precedents' broad conceptualizations of liberty in asserting that homosexuals have a fundamental substantive due process right to their intimate associations.[209] Justice Blackmun, writing for the four-person dissent, noted that the Court

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[201] *See Loving*, 388 U.S. at 12.

[202] *See Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting); *Loving*, 388 U.S. at 12.

[203] *See Casey*, 505 U.S. at 851; *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

[204] *See* 381 U.S. at 486.

[205] *See* 505 U.S. at 851.

[206] *See* 431 U.S. at 504 n.11.

[207] *See Casey*, 505 U.S. at 851; *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting); *Moore*, 431 U.S. at 504 n.11; *Griswold*, 381 U.S. at 483 (noting that the Court must extend constitutional protection to peripheral rights to properly secure the specific rights).

[208] *See* Kelly, *supra* note 3, at 232.

[209] *See* 478 U.S. at 201, 204–08 (Blackmun, J., dissenting).

should have analyzed Hardwick's claim in light of the values that underlie the constitutional right to privacy.[210]

Justice Blackmun asserted in *Bowers* that the right to privacy includes individuals' choices about the most intimate aspects of their lives, such as their intimate associations and sexual relations.[211] He then noted that substantive due process protects certain rights associated with the family because these rights form a central part of an individual's life.[212] He reasoned that rights protected by substantive due process touch upon individuals' self-definition and ability to independently define their identity, which in turn are central to any concept of liberty.[213] The *Bowers* dissent concluded that individuals define themselves in a significant way through their intimate sexual relationships, and that individuals have the right to choose for themselves the form and nature of these personal bonds.[214]

Thus, the *Bowers* dissenters explicitly endorsed the thesis that the Court is striving to protect an individual's underlying right to self-definitional autonomy by recognizing certain specific rights as fundamental liberties under substantive due process.[215] In this view, rights such as marriage are protected because they are crucial constituent rights that, taken together, contribute to an individual's overall ability to live her or his own life, her or his own way.[216]

2. Framers' Intent

The Framers purposefully structured the Constitution in terms of broad concepts because they knew that a document that would endure through generations had to adapt its meaning to changing conditions.[217] As Justice Frankfurter asserted, great concepts like liberty were purposefully left to gather meaning from experience in order to accommodate changing views.[218]

The Court also pointed out that the Framers sought to protect Americans in their beliefs, thoughts, emotions and sensations—all of which are intrinsically tied to an individual's self-definitional auton-

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[210] *Id.* at 199 (emphasis added). The dissent included Justices Blackmun, Brennan, Marshall, and Stevens. *Id.* at 199.

[211] *Id.* at 199–201, 203 n.2.

[212] *See id.* at 204.

[213] *Id.* at 205.

[214] *See Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting).

[215] *See id.*

[216] *See id.* at 206; *see also* MILL, *supra* note 140, at 13.

[217] *See Roe*, 410 U.S. at 169 (Stewart, J., concurring).

[218] *Id.* (quoting Frankfurter, J., dissenting, in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646).

omy.[219] This includes one's right to choose the form and nature of one's intimate associations.[220]

Furthermore, the specific constituent rights that comprise an individual's fundamental right to self-definitional autonomy need *not* be textually enumerated.[221] As Justice Goldberg pointed out in his concurrence in *Griswold*, the Framers did not intend that the first eight Amendments be construed to exhaust the fundamental rights that the Constitution guarantees to the people.[222] In fact, such a judicial construction would violate the Ninth Amendment's explicit mandate that the enumerated rights shall not be construed to deny or disparage others retained by the people.[223]

3. Using the Broader Right's Historical Roots to Protect the Narrower Right as Fundamental

The Supreme Court has upheld some variants of previously acknowledged fundamental rights that were not themselves rooted in tradition at all.[224] For instance, the *Loving v. Virginia* Court upheld the substantive due process right of every individual to marry the person of their choice despite the fact that interracial marriages were not deeply rooted in history and tradition, and were in fact highly condemned by most of American society.[225] In *Bowers*, Justice Blackmun referred to the parallel between *Loving* and homosexual intimate association on this very ground.[226] Namely, opponents of *both* interracial marriages and homosexual intimate association point to traditional Judeo-Christian values and states' criminal statutes concerning the conduct at issue—but this reasoning was rejected in *Loving*, partially because marriage was involved.[227] The *Loving* Court's finding of a fundamental right despite the lack of a deeply rooted right to this particular variant of marriage stems from the Court's hitherto unwav-

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[219] *See Bowers*, 478 U.S. at 207 (Blackmun, J., dissenting).

[220] *See id.* at 206.

[221] *See Griswold*, 381 U.S. at 490 (Goldberg, J., concurring).

[222] *Id.*

[223] U.S. CONST. amend. IX (stating that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people); *Griswold*, 381 U.S. at 491.

[224] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S at 486.

[225] *See* 388 U.S. at 6, 12.

[226] *See Bowers*, 478 U.S. at 211 n.5 (Blackmun, J., dissenting).

[227] *See id.*

ering protection of the right to marriage.[228] This is true even where a person's liberty interest is compromised.[229]

As illustrated by the Court in *Turner v. Safley*, even a criminal whose liberty interests, including the interest in sexual intimacy, are legitimately curtailed by the state retains a fundamentally protected residual interest in marriage.[230] *Turner* demonstrates that the *Bowers* Court's holding that homosexual sodomy is not a fundamental right does not preclude a later finding that same-sex marriages are fundamentally protected under substantive due process.[231] Namely, while the states may have the right to curb sodomy, same-sex marriages—like the marriage of the inmates in *Turner*—have important attributes *besides* sexual conduct that are sufficient to form a constitutionally protected marital relationship.[232] If the Court is logically consistent, restrictions upon a same-sex couple's right to enter into a marriage, like the restrictions in *Turner*, should not even survive minimal scrutiny *despite* arguably legitimate restrictions on their sexual conduct.[233] This, of course, would be the constitutional *minimum*, since same-sex couples, unlike the inmates in *Turner*, are not criminals whose liberty interests can legitimately be curtailed by the states' penological interest.[234] Thus, restrictions upon a same-sex couple's right to enter into a marriage should be subject to strict scrutiny review.[235]

Likewise, by framing the right in question as the right to privacy in marriage, the *Griswold* Court protected married couples' right to use contraceptives *despite* the fact that contraceptive use was not deeply rooted in our history and traditions.[236] This broader conceptualization of the right at bar enabled the Court to find its deep roots in our tradition, because the right of privacy in marriage is a right older than the Bill of Rights.[237]

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[228] *See* Turner v. Safley, 482 U.S. 78, 95–96 (1987); *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 486.

[229] *See Turner*, 482 U.S. at 95–96.

[230] *See id.*

[231] *See id.* (holding that even when an individual's sexual conduct is lawfully regulated, the individual still retains the right to marriage).

[232] *See Bowers*, 478 U.S. at 191; *Turner*, 482 U.S. at 95–96.

[233] *See* 482 U.S. at 97.

[234] *See id.* at 95–96.

[235] *See id.* at 81, 89 (noting that a lesser standard than strict scrutiny applies because of inmates' restricted liberty interests in the prison context).

[236] *See* 381 U.S. at 486, 505.

[237] *See id.*

B. *Evolving Conscience: A Right Need Not Be Deeply Rooted to Be Fundamental*

> *The Constitution is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.*
>
> —Justice Holmes[238]

The U.S. Supreme Court's substantive due process jurisprudence demonstrates that the "deeply rooted" test is often flexibly implemented depending on the specific rights at stake.[239] The Court often finds a right's deep roots by focusing on selective parts of an inconsistent historical record, or by drawing upon our societal evolving conscience.[240]

Roe v. Wade is very telling of the Court's willingness to accord fundamental status to rights that, when narrowed to the specific action at issue, are not deeply rooted in our traditions.[241] Unlike *Griswold*, *Roe* did not even involve a marital relationship upon whose deep roots the Court could ground its finding of a constitutionally protected right to an abortion.[242] As pointed out by Justice Rehnquist in dissent, the majority in *Roe* glossed over historical evidence that abortion had been criminalized under eighteenth century common law.[243] The majority dismissed this evidence by reasoning that it is doubtful that abortion was ever firmly established as a common-law crime.[244] Thus, the majority held that abortion is a fundamental right despite the historical evidence that arguably opposed, and at best tenuously supported, the deep roots of the right to an abortion. [245]

Furthermore, *Casey* is one of the latest examples of the Court's willingness to find a fundamental liberty interest in rights that are not deeply rooted in tradition.[246] The Court reasoned that a state may not unduly burden a woman's right to choose an abortion before fetal

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[238] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[239] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[240] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66.

[241] *See* 410 U.S. at 136–39, 153 (noting conflicts within common law tradition regarding abortion).

[242] *See id.* at 113 (noting that Jane Roe was a single pregnant woman).

[243] *See id.* at 174–75 (Rehnquist, J., dissenting).

[244] *See id.* at 136.

[245] *See id.* at 153, 174–75.

[246] *See* 505 U.S. at 846–50.

viability.[247] The *Casey* Court ducked the concerns about abortion not being deeply rooted in our history and tradition by grounding its decision on *stare decisis* and on the reliance of society upon *Roe* during the previous thirty years.[248] This basis for the *Casey* decision suggests that the Court was looking to our society's evolving conscience in upholding the fundamental right to an abortion.[249] In fact, the *Casey* Court implicitly admitted that the "deeply rooted" test is *not* the best proxy for defining fundamental rights under substantive due process.[250]

Conclusion

The U.S. Supreme Court, although emphasizing tradition and history as the roots from which fundamental rights stem, has been quite willing to overlook, or to selectively read, such history and traditions.[251] It has done so when the plurality feels it is proper to uphold as fundamental some variant forms of fundamental rights that have been undermined by, and actively infringed upon, history and tradition.[252] This methodology is consistent with the view that the judiciary should protect un-enumerated rights that are retained by the people and are essential components of broader fundamental rights.[253]

As illustrated in this Note, the Court's substantive due process jurisprudence can accommodate same-sex marriage as a fundamental right, and thereby subject the Defense of Marriage Act to strict scru-

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[247] *See id.* at 874–77.

[248] *See id.* at 846.

[249] *See id.* at 846–50.

[250] *See id.* at 850 (reasoning that the adjudication of substantive due process claims may require the Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society).

[251] *See* Roe v. Wade, 410 U.S. 113, 130–40, 153 (1973) (finding that the fundamental right to privacy includes the right to choose to have an abortion, despite deeply entrenched societal and religious convictions against it); Loving v. Virginia, 388 U.S. 1, 6, 12 (1967) (holding that the fundamental right to marriage includes interracial marriages despite longstanding history of a societal animus toward racial miscegenation); Griswold v. Connecticut, 381 U.S 479, 486, 505 (1965) (finding that the fundamental right to privacy includes the right for married couples to use contraceptives despite history of moral disapproval of contraceptives). In doing so, it is true that the Court sometimes utilizes equal protection to extend an already recognized due process fundamental right to classes that were not traditionally included in it. *See Loving*, 388 U.S. at 2. The Court has also, however, utilized a "pure" substantive due process analysis to broadly interpret fundamental rights in order to include rights to which history and tradition were quite hostile. *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S at 486.

[252] *See Roe*, 410 U.S. at 130–40, 153; *Loving*, 388 U.S. at 6, 12; *Griswold*, 381 U.S. at 486, 505.

[253] *See* U.S. Const. amend. IX; *supra* notes 79–107, 217–223 and accompanying text.

tiny.[254] This is because of the two primary methodologies the Court used in applying the "deeply rooted" test to its precedents.[255] Namely, the Court's methodology in the first class of cases was to frame the right in question as a broad right that encompasses the narrow right at bar.[256] It then uses the deep historical roots of the broader right to support the extension of fundamental status to its narrower variant.[257] In the second class of cases, the Court upholds certain rights as fundamental by either selectively focusing on favorable parts of a conflicting historical record, or by emphasizing historical changes that imply a societal evolving conscience.[258]

If the Court fails to subject DOMA to strict scrutiny for infringing upon either the fundamental right to marry or the fundamental right to self-definitional autonomy, it could undermine its own precedents. Namely, if the Court declines to use the methodologies employed in cases such as *Loving, Griswold, Casey* and *Roe,* to protect same-sex marriages as fundamental rights, it could call into question the continued viability of its own methodologies.[259] The Court might also expose itself to criticism for selectively employing such methodologies at its own judicial whim.[260] This could in turn weaken these precedents themselves, for it would erode the viability of the methodologies by which the Court arrived at these holdings. The emasculation of these precedents would in turn undermine the protections currently afforded to our most cherished liberties, which enable us to choose how to conduct our intimate lives our own way.[261]

VERONICA C. ABREU

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[254] *See* Planned Parenthood v. Casey, 505 U.S. 833, 846–50 (1992); *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[255] *See Casey*, 505 U.S. at 846–50; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[256] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[257] *See Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[258] *See Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66.

[259] *Cf. Casey*, 505 U.S. at 846–50; *Roe*, 410 U.S. at 158–66; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 483–86.

[260] *See* Willett, *supra* note 15, at 363 (criticizing the *Bowers* Court for "conveniently" failing to use the methodology it employed in *Roe* and *Griswold*).

[261] *See* MILL, *supra* note 140, at 13.